

State Notes

TOPICS OF LEGISLATIVE INTEREST

May/June 2007



An Overview of Partial-Birth Abortion Laws and Court Rulings **By Patrick Affholter, Legislative Analyst**

The practice and regulation of what is commonly referred to as "partial-birth abortion" have been a contentious issue on the state and Federal levels for several years. Since the 1990s, a majority of states have enacted laws prohibiting partial birth abortions, according to the website for the Guttmacher Institute (<http://www.guttmacher.org>). Most of the bans have been specifically blocked by courts, while others have remained unchallenged but may be unenforceable pursuant to the 2000 U.S. Supreme Court decision in *Stenberg v Carhart*, which invalidated a Nebraska law (discussed below). Evidently, only Ohio's ban has been upheld by a court after being challenged.

Recent court cases involving both Federal and Michigan laws have shed new light on the partial-birth abortion issue.

In April 2007, in *Gonzales v Carhart*, the United States Supreme Court upheld a Federal law passed in 2003 that bans partial-birth abortion. Unlike the Court's previous decision on this subject, *Stenberg v Carhart*, the *Gonzales* decision did not find the 2003 Federal proscription to be void for vagueness or lack of an exception for the health of the mother.

Subsequent to the *Gonzales* decision, in June 2007, the U.S. Court of Appeals for the Sixth Circuit overturned Michigan's Legal Birth Definition Act in *Northland Family Planning Clinic v Cox* because, as was the case in *Stenberg*, the statute would have prohibited other procedures not generally considered to constitute partial-birth abortion, and therefore placed an unconstitutional burden on a woman's right to terminate her pregnancy.

This article reviews some key abortion-related court cases, including the 2007 Supreme Court and Court of Appeals decisions, as well as the Federal and State statutes that gave rise to those recent cases.

General Abortion-Related Case Law

Roe v Wade (410 U.S. 113). In 1973, the U.S. Supreme Court held that a Texas law that criminalized abortions except those necessary to save the mother's life, without regard to pregnancy stage and without recognition of the other interests involved, violated the Due Process Clause of the Fourteenth Amendment. The Court found that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy...but that this right is not unqualified and must be considered against important state interests in regulation"; and, "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life".

The Court concluded that, for the stage before the approximate end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. For the stage after the approximate end of the first trimester, the state, in promoting its interest in the health of the mother, may regulate the abortion procedure in ways that are reasonably related to maternal health. For the stage subsequent to viability, the state, in promoting its interest in the potentiality of human life, may regulate



and even proscribe abortion except when it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Planned Parenthood of Central Missouri v Danforth (428 U.S. 52). This 1976 case apparently was the only U.S. Supreme Court decision involving the constitutionality of a ban on a specific abortion procedure, until *Stenberg* in 2000. In addition to addressing several other issues, the Court held that a Missouri statute banning the saline amniocentesis abortion procedure was unconstitutional. According to the trial court record, this method was one of the most commonly used in the nation after the first trimester, and, with respect to maternal mortality, safer than continuation of the pregnancy until normal childbirth. The Supreme Court reasoned that, "as a practical matter, it forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed". The Court concluded that the ban on the procedure constituted an "unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge."

Planned Parenthood of Southeastern Pennsylvania v Casey (505 U.S. 833). In this 1992 plurality opinion, which dealt with the issue of informed consent to abortion, the U.S. Supreme Court reaffirmed the essential holdings in *Roe* that: A woman has the right to terminate her pregnancy before fetal viability occurs without any undue interference from the state; a state has the power to restrict abortions after viability, if the law contains exceptions for a pregnancy that endangers the woman's life or health; and the state has a legitimate interest from the outset of a pregnancy in protecting the health of the woman and the potential life of the fetus that may become a child. The Court, however, also affirmed its 1989 decision in *Webster v Reproductive Health Services* (492 U.S. 490) to reject the rigid trimester framework outlined in *Roe*, reasoning that that approach was incompatible with the state's interest in potential life throughout the pregnancy.

The plurality *Casey* opinion adopted an "undue burden" standard for evaluating a state's abortion restrictions and held that an undue burden exists when a provision of law has the purpose or effect of placing a "substantial obstacle" in the path of a woman seeking an abortion before fetal viability. Using this standard, the Court ruled that Pennsylvania's informed consent provisions—including a 24-hour waiting period and fetal descriptions—did not pose an undue burden on a woman's right to terminate a pregnancy, although the Court did reject a spousal notification requirement.

Previous Partial-Birth Abortion Laws and Decisions

Michigan Statutes and Court Challenges. Public Act 273 of 1996 enacted a ban on partial-birth abortion but was overturned in 1997 by the U.S. District Court for the Eastern District of Michigan (*Evans v Kelley*, 977 F. Supp. 1283). Public Act 273 amended the Public Health Code to prohibit a "partial-birth abortion", except to save the life of a pregnant woman. "Partial-birth abortion" was defined as a procedure in which a physician or a person acting under a physician's delegatory authority partially vaginally delivered a living fetus before killing the fetus and completing the delivery.



The *Evans* Court found that the Act's definition of "partial-birth abortion" was "hopelessly ambiguous and not susceptible to a reasonable understanding of its meaning", in violation of Due Process requirements that people subject to regulation have a reasonable opportunity to know what conduct is prohibited. The Court declared the entire statute void. The Court also found that the statute's prohibition included several abortion procedures, including one used in more than 85% of the post-first-trimester abortions performed in Michigan. The Court then concluded that Public Act 273 was "facially overbroad because in a substantial percentage of cases in which the statute is implicated, it will operate as a substantial obstacle to a woman's choice to undergo an abortion", thereby placing an undue burden on women seeking an abortion, in violation of *Casey*.

After the *Evans* decision, Public Act 107 of 1999 attempted to ban partial-birth abortions by establishing the Infant Protection Act. That Act made it a felony for a person intentionally to perform a procedure or take an action upon a "live infant" (as defined in the Act) with the intent to cause the infant's death. In April 2001, the U.S. District Court for the Eastern District of Michigan ruled the Act unconstitutional and permanently enjoined the State from enforcing it (*Womancare of Southfield v Granholm*, 143 F. Supp. 2nd 849).

In its ruling, the Court held that the statute failed "to contain an adequate exception to protect the mental and/or physical health of the pregnant woman" and that the effect of Michigan's law was "to place an undue burden on a pregnant woman's right to make a decision regarding abortion".

U.S. Supreme Court Decision. In 2000, in *Stenberg v Carhart* (530 U.S. 914), the U.S. Supreme Court addressed the constitutionality of Nebraska's ban on partial-birth abortion. The Court declined to revisit the established legal principle "that the Constitution offers basic protection to the woman's right to choose". Rather, it applied to the Nebraska law three other established principles to determine the constitutionality of the partial-birth abortion ban.

The three principles are: 1) Before viability, a woman has the right to choose termination of her pregnancy; 2) a law restricting abortion is unconstitutional if it imposes an undue burden on the woman's decision before fetal viability and that undue burden is "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"; and 3) "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother". After considering these principles, the Court held that the Nebraska statute was unconstitutional.

Since the Nebraska law sought to prohibit a particular procedure, the Court offered a detailed description of various abortion procedures, including dilation and evacuation (D&E), which the Court identified as the most commonly used procedure in second trimester abortions, and dilation and extraction (D&X), also known as intact D&E (the procedure used in what generally is referred to as "partial-birth abortion").

The *Stenberg* Court determined that Nebraska's law violated the Constitution for at least two reasons. Quoting *Casey*, the Court stated, "First, the law lacks any exception 'for the



preservation of the...health of the mother'...Second, it 'imposes an undue burden on a woman's ability' to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself." The Court also determined that the Nebraska statute did not further an interest in the potentiality human life of the fetus because it would not save the fetus from destruction, but would regulate only a method of performing abortion.

The Court particularly identified as problematic the Nebraska law's application both before and after viability and its use of the term partial-birth abortion without reference to which medical procedure was prohibited. The Court posited that, since case law requires a health exception "in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation", and the statute contained no such exception. In addition, while Nebraska officials contended that the ban applied only to the D&X procedure, the Court stated, "Even if the statute's aim is to bar D&X, its language makes clear that it also covers a much broader category of procedures. The language does not track the medical differences between D&E and D&X--though it would have been a simple matter [to do so]".

The Court summarized its findings as follows: "[U]sing this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional."

Recent Partial-Birth Abortion Laws and Decisions

Federal Prohibition. In 2003, Congress passed and President George W. Bush signed into law the Partial-Birth Abortion Ban Act (18 USC 1531). The Act prohibits a physician, acting in or affecting interstate or foreign commerce, from knowingly performing a partial-birth abortion, thereby killing a human fetus. The prohibition "does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself". The Act prescribes a criminal penalty of a fine or up to two years' imprisonment and includes provisions for civil actions.

The Act defines "partial-birth abortion" as an abortion in which the person performing the procedure "deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus".

The Act also contains a list of Congressional findings, including that "Congress is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg*" and "is entitled to reach its own factual findings...and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and draws reasonable inferences based upon substantial evidence".



Gonzales v Carhart. In overturning lower courts and upholding the Federal Partial-Birth Abortion Ban Act, the U.S. Supreme Court stated, "Compared to the state statute at issue in *Stenberg*, the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage." Since the prohibited procedure involves delivery of a fetus to certain "anatomical landmarks" (i.e., the presentation of the head or, in a breech birth, the presentation of the trunk past the navel), the Court held that the Act affords doctors a reasonable opportunity to know what is prohibited: "Unlike the statutory language in *Stenberg* that prohibited delivery of a 'substantial portion' of the fetus—where a doctor might question how much of the fetus is a substantial portion—the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other." Also, since the Act refers to knowingly performing a partial-birth abortion, the Court concluded that it could not be considered a "trap" to catch a doctor performing a standard D&E who mistakenly, or because of some development during surgery, performs an intact D&E.

The Court also discussed the Act's lack of a health exception, but held, "The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives." The Court concluded, "The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude...that the Act does not impose an undue burden."

In sum, the Court stated, "We conclude that the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face."

Michigan Law. In 2003, the Legislature approved Senate Bill 395, which proposed the Legal Birth Definition Act, and sent the bill to Governor Jennifer M. Granholm, who vetoed the measure. The Act then was proposed by initiative petition and passed into law by the Legislature, without the Governor's signature, becoming Public Act 135 of 2004. (Under Article 2, Section 9 of the State Constitution, measures proposed by citizen initiative and approved by a majority vote of the Senate and House of Representatives become law without the Governor's signature.)

The Legal Birth Definition Act does not refer directly to any abortion procedure, but provides that a "perinate" is considered a legally born person for all purposes under the law. The Act defines "perinate" as "a live human being at any point after which any anatomical part of the human being is know [sic] to have passed beyond the plane of the vaginal introitus until the point of complete expulsion or extraction from the mother's body". "Live" means demonstrating one or more of the following biological functions: a detectable heartbeat, evidence of breathing, evidence of spontaneous movement, or umbilical cord pulsation. "Anatomical part" means any portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta.

The Act includes an immunity provision for performing any procedure that results in injury or death of a perinate if the perinate is being expelled from the mother's body as a result of a spontaneous abortion; or if, in the physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, the procedure was necessary



either 1) to save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate, or 2) to avert an imminent threat to the physical health of the mother, and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed.

The Act also contains a list of legislative findings, including that the U.S. Supreme Court, in *Roe*, declared that while an unborn child is not a person as understood and protected by the constitution, any born child is a legal person with full rights, but that the *Roe* Court did not attempt to define birth or place any restrictions on the states in defining when a human being is considered to be born. The legislative findings also state, "That, when any portion of a human being has been vaginally delivered outside his or her mother's body, that portion of the body can only be described as born and the state has a rational basis for defining that human being as born and as a legal person."

Northland Family Planning Clinic v Cox. The U.S. Sixth Circuit Court of Appeals found that "Michigan's law fails to comply with the explicit limitations that the Supreme Court has established for statutes regulating abortion", and affirmed the ruling of the U.S. District Court that the Legal Birth Definition Act is unconstitutional.

The Court of Appeals pointed out that, unlike the Federal prohibition upheld in *Gonzales*, the Michigan statute does not rely on anatomical landmarks, but essentially would prohibit any abortion procedure in which any anatomical part of a live fetus is removed from the mother's body. The Court opined that this "necessarily means it applies to D&E procedures" and also could apply to other protected abortion procedures. The Court stated, "*Gonzales* left undisturbed the holding from *Stenberg* that a prohibition on D&E amounts to an undue burden on a woman's right to terminate her pregnancy". "[I]t is apparent that the Michigan statute would prohibit D&E, and under the framework of *Stenberg* and *Gonzales*, impose an unconstitutional undue burden."

In reviewing the question of the health exception in the Michigan statute, the Court of Appeals suggested that although "*Gonzales* complicated the meaning of *Stenberg*'s holding regarding the need for a health and life exception", it could affirm the District Court's ruling that the Act failed to protect the health of the woman "without addressing the complicated implications of *Gonzales*". The Court of Appeals stated, "The bottom line is that the life and health exceptions are *exceptions* to an unconstitutional and un-fixable general prohibition on certain abortion procedures. That is to say it is unnecessary...to address exceptions to an unconstitutional and unenforceable general rule" (emphasis in original).

As of June 22, 2007, the Michigan Attorney General's office had not decided whether to pursue an appeal to the U.S. Supreme Court.

Conclusion and Outlook

By upholding the Federal ban on partial-birth abortion, the U.S. Supreme Court's *Gonzales* opinion may seem to represent a broad departure from previous court opinions regarding the procedure. The Court's recent focus on the use of anatomical landmarks in the Partial-Birth Abortion Ban Act, however, also provides a framework for assessing future attempts to ban

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particular abortion procedures. In light of *Gonzales*, the Sixth Circuit Court of Appeals ruling regarding Michigan's Legal Birth Definition Act might seem confusing; however, while the Supreme Court contrasted the Federal ban to the Nebraska statute previously overturned in *Stenberg*, the Court of Appeals found Michigan's ban similar to the Nebraska law and not in line with the Federal law upheld in *Gonzales*.

In addition, in support of its position on the Legal Birth Definition Act, the State had pointed to a 2003 Sixth Circuit Court of Appeals decision upholding an Ohio ban on partial-birth abortion (*Women's Medical Professional Corporation v Taft*). The Court of Appeals, however, described the Ohio statute as "significantly narrower", and pointed out that the Ohio law specifies that it does not prohibit certain abortion procedures, including D&E. The Court also noted that it had upheld the Ohio statute the year before Michigan's Legal Birth Definition Act was adopted. "Michigan could have simply copied that statute word-for-word, and been virtually guaranteed a favorable result in the courts of this Circuit."

The *Gonzales* April 2007 opinion might be expected to provide an impetus for states to enact similar prohibitions modeled on the Federal Partial-Birth Abortion Ban Act. As of June 2007, legislation essentially mirroring the Federal law has been introduced in Michigan and Louisiana. According to information supplied by the National Conference of State Legislatures, bills have passed each house of the Louisiana legislature and are pending in the other house. In Michigan, House Bill 4613 was introduced on April 19 (the day after the *Gonzales* decision was issued) and has been referred to the House Committee on Judiciary.